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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LETICIA MONTOYA ZEPEDA, Defendant and Appellant.	B299071 (Los Angeles County Super. Ct. No. PA066801)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zackey, Judge. Affirmed.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Daniel C. Chung and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner Leticia Marie Montoya Zepeda (Montoya) appeals from the summary denial of her petition for resentencing under Penal Code[1] section 1170.95. Without appointing counsel for Montoya, the trial court denied her petition after considering our prior opinion from Montoya's direct appeal (*People v. Montoya* (Jan. 7, 2015, B243042) [nonpub. opn.] (*Montoya I*). In our prior opinion, we held that the trial court erred by instructing the jury on first degree murder under a legally invalid theory (the natural and probable consequences doctrine), but concluded that the error was harmless beyond a reasonable doubt because the jury must have based its first degree murder verdict on a legally valid theory (direct aiding and abetting of premeditated murder). (*Id.* at p. 12.)

Montoya contends the trial court erred by summarily denying her petition prior to appointing her counsel, and by utilizing our opinion in *Montoya I* to conclude that she was ineligible for relief as a matter of law. We affirm the judgment.[2]

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[1] Further undesignated statutory references are to the Penal Code.

[2] In light of our conclusion, we do not address Montoya's alternative contention (with which the Attorney General agrees) that the trial court erred in finding section 1170.95 and its enacting legislation, Senate Bill No. 1437, unconstitutional.

BACKGROUND

Our summary of the factual background is based on the record of appeal and our opinion affirming Montoya's conviction in *Montoya I*.[3]

Montoya and another codefendant, Sergio Flores,[4] were tried for willful, deliberate and premeditated murder (§ 187, count 1) and shooting from a motor vehicle (former § 12034, subd. (b), count 3)).[5] Firearm allegations were included in count 1 (§§ 12022.53, subds. (b), (c), (d), (e)(1)), and criminal street gang allegations were included in counts 1 and 3 (§ 186.22, subd. (b)(1)(c)).

At trial, it was undisputed that Flores fired three to four shots at the victim from a car that Montoya was driving. Jose Andalon, the shot-caller for Montoya's gang, testified on behalf of the People in exchange for dismissal of numerous charges and a favorable sentence in an unrelated case. During his testimony, Andalon identified Montoya as a fellow gang member, established a motive for the shooting, and recited incriminating statements Montoya had made to Andalon after

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[3] We take judicial notice of our opinion and the record in *Montoya I*.

[4] Montoya and Flores were tried in a joint trial to separate juries. Flores is not a party to this appeal.

[5] Former section 12034, subdivision (b) is presently found at section 26100, subdivision (b), which provides: "Any driver or owner of any vehicle, whether or not the owner of the vehicle is occupying the vehicle, who knowingly permits any other person to discharge any firearm from the vehicle is punishable by imprisonment in the county jail for not more than one year or in state prison for 16 months or two or three years."

the shooting.[6] The jury also heard exculpatory statements that Montoya had made during a taped interview following her arrest.[7]

The jury was presented with two theories of first degree murder: direct aiding and abetting a willful, deliberate, and premeditated murder (which under the instructions required a finding that defendant "aid[ed] and abet[ted] the perpetrator's commission of" willful, deliberate, premeditated murder with "kn[owledge] that the perpetrator intended to commit" a premeditated murder and with the "specific[] inten[t] to . . . aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime"); and direct aiding and abetting an assault with a deadly weapon under the natural and probable consequences theory.[8]

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[6] During a phone conversation, Montoya told Andalon she and Flores were smoking PCP at her house when they both felt they had to do something about a prior shooting and Flores getting jumped. Montoya and Flores walked to Flores's house to retrieve a rifle, and both walked back to Montoya's house, carrying the rifle between them. After learning the location of several rival gang members, Montoya drove Flores, who sat in the front seat, and Jose Euyoque (another gang member) to the reported location. After passing the house where the rival gang members were located, Montoya made a U-turn, turned off the headlights, and drove up to a group of people in front of the house. Flores "told them where they were from. Before [the victim] even answered, he pulled the trigger and shot them." (*Montoya I*, *supra*, at p. 5.)

[7] In her taped statement, Montoya denied retrieving the rifle with Flores. Montoya also claimed that she did not know Flores had the rifle in the car until she heard multiple gunshots from the passenger's side. (*Montoya*, *supra*, at p. 6.)

[8] A direct aider and abettor of premeditated murder "acts with the mens rea required for first degree murder" when "the defendant aided or

By general verdict, the jury found Montoya guilty in count 1 of first degree murder, and in count 3 of shooting from a motor vehicle, with sustained findings on the firearm and criminal street gang allegations. Montoya also was found to have suffered a prior prison term. The court sentenced Montoya to 51 years to life, consisting of 25 years to life for murder, 25 years to life for the gang and firearm enhancements, and one year for the prior prison term. The sentence on count 3, shooting from a motor vehicle, was stayed under section 654.

In her direct appeal, Montoya challenged the jury instruction on the natural and probable consequences doctrine in light of *People v. Chiu, supra,* 59 Cal.4th 155 (*Chiu*), which the Supreme Court had issued while her case was pending. As part of her argument, Montoya asserted reversal of her murder conviction was required unless the

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encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.] Because the mental state component—consisting of intent and knowledge—extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder. ([*People v.*] *McCoy* [(2001)] 25 Cal.4th [1111,] 1118, ['an aider and abettor's mental state must be at least that required of the direct perpetrator']; cf. *Rosemond v. United States* (2014) 572 U.S. [65], [76–77].) An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent." (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Under the natural and probable consequences doctrine, a "'person who knowingly aids and abets criminal conduct is guilty of not only the intended crime . . . but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime.'" (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

verdict and evidence left no reasonable doubt that the jury made the necessary findings of directly aiding and abetting premeditated murder. She also argued the jury was not required to resolve the question of whether she intended to aid and abet the premeditated murder, because it needed to find only that she aided and abetted an assault with a deadly weapon to convict her of first degree murder. The Attorney General argued that the evidence was overwhelming that Montoya directly aided and abetted a premeditated murder.

Despite our agreement with Montoya that it was error to give the natural and probable consequences instruction, we held that the error was harmless beyond a reasonable doubt because the jury necessarily concluded that Montoya, with the intent to kill, directly aided and abetted a premeditated murder: "On this record, we are satisfied beyond a reasonable doubt that the jury based its first degree murder verdict on the legally valid theory that Montoya directly aided and abetted an intentional, deliberate, and premeditated murder. (*Chapman* [*v. California* (1967)] 386 U.S. [18,] 22–24.) We conclude the instructional error was harmless." (*Montoya I*, *supra*, at p. 22.) We came to this conclusion after finding that Montoya, "if guilty at all, was guilty of first degree premeditated murder. [¶] The guilty verdict on count 3, shooting from a motor vehicle, indicates the jury rejected Montoya's exculpatory account of the shooting (provided during her custodial interview) in favor of her inculpatory statements to her friend Andalon. Her actions were identical to those of Flores, except that she drove the car while he pulled the trigger. . . . By her own conduct and incriminating statements to Andalon, Montoya demonstrated that she

possessed the necessary mental state, [intentional aiding and abetting a premeditated murder], to be convicted of first degree premeditated murder. [Citations.]" (*Id*. at pp. 21–22.)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) (S.B. 1437), which amended section 188 to eliminate liability for murder under the natural and probable consequences doctrine. (*People v. Lopez* (2019) 38 Cal.App.5th 1087, 1092–1093, rev. granted, S258175, Nov. 13, 2019.) The legislation also added section 1170.95, which establishes a procedure for vacating murder convictions that were based upon the natural and probable consequences doctrine and resentencing those who were so convicted. (Stats. 2018, ch. 1015, § 4, pp. 6675–6677.)

In April 2019, Montoya filed a petition in the superior court for resentencing pursuant to section 1170.95. The one-page petition consisted of checked off boxes on a prewritten form regarding eligibility for relief and appointment of counsel during the "re-sentencing process." The petition was signed by a deputy alternate public defender. Although the statute requires such information, the petition did not attach a declaration or affidavit, or any documentation from Montoya's prior conviction.

On May 3, 2019, the trial court summarily denied Montoya's petition without appointing her counsel or holding a hearing. After summarizing the factual background from *Montoya I*, the trial court concluded that Montoya was ineligible for resentencing because she "clearly aided and abetted the killing. At a minimum, the evidence

clearly demonstrates that [Montoya] was a major participant and acted with reckless indifference to human life."

Montoya timely filed a notice of appeal.

DISCUSSION

A. *Senate Bill No. 1437 and Petitions under Section 1170.95*

S.B. 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) It accomplished this purpose by amending section 188, defining malice, and section 189, defining the degrees of murder.

S.B. 1437 also added section 1170.95. (Stats. 2018, ch. 1015, § 4.) That statute allows a person convicted of felony murder, or murder under the natural and probable consequences doctrine, to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial . . . . [¶] (3) The petitioner could not be convicted of

first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a).)

Subdivision (b)(1) of section 1170.95 requires that the petition be filed with the court that sentenced the petitioner, and must include (a) a declaration by the petitioner that he or she is eligible for relief under the section; (b) the superior court case number and year of conviction; and (c) whether the petitioner requests appointment of counsel. Subdivision (b)(2) provides that the trial court may deny the petition without prejudice "[i]f any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court."

If the petition contains the requisite information, subdivision (c) of section 1170.95 provides that "[t]he court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)[9]

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[9] The remainder of the statute sets forth the procedure for responding to, and the hearing on, the order to show cause, as well as post-hearing matters.

Soon after section 1170.95's enactment, considerable debate arose as to how trial courts should operate in accordance with section 1170.95, subdivision (c). We find the guidance in *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, S260493 (*Verdugo*), and *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1140, review granted March 18, 2020, S260598 (*Lewis*) to be particularly persuasive. (See Cal. Rules of Court, rule 8.1115(e)(1).)

The *Verdugo* court explained that "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95—that is, a prima facie showing the petitioner may be eligible for relief because he or she could not be convicted of first or second degree murder following the changes made by [S.B.] 1437 to the definition of murder in sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 323; see also *Lewis*, *supra*, 43 Cal.App.5th at pp. 1137–1140.)

The *Verdugo* court concluded that subdivision (c) of section 1170.95 provides for an initial prima facie review that "must be something more than simply determining whether the petition is facially sufficient"[10] (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328), but it

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[10] The court noted that if this were not the case, the first sentence of subdivision (c) would be surplusage in light of subdivision (b)(2). (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 328–329.)

"must also be different from the postbriefing prima facie showing the petitioner 'is entitled to relief,' required for issuance of an order to show cause, if only in the nature and extent of materials properly presented to the court in connection with the second prima facie step" (*id.* at p. 329). Thus, the initial prima facie review under subdivision (c) "is a preliminary review of statutory eligibility for resentencing, a concept that is a well-established part of the resentencing process under Propositions 36 and 47. [Citations.] The court's role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Ibid.*)

B. *Montoya's Contentions*

Montoya contends the trial court erred when it summarily denied her section 1170.95 petition because: (1) the court could not consider our prior appellate opinion, which Montoya contends cannot be given preclusive effect; and (2) the court refused to appoint her counsel prior to making its ruling.

Though both issues are presently before our Supreme Court (see *Lewis*, *supra*, S260598),[11] we conclude that the trial court properly

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[11] "The issues to be briefed and argued are limited to the following: (1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)." (*Lewis*, *supra*, S260598.)

considered our prior opinion to find that Montoya was ineligible for relief as a matter of law. In light of that finding, Montoya was not entitled to appointment of counsel.

1. *Consideration of a Prior Appellate Opinion as Part of the Record of Conviction*

At the first prima facie review stage under section 1170.95, subdivision (c), the court was required to determine whether Montoya was ineligible for relief as a matter of law. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) One of the conditions for relief under section 1170.95 is that the petitioner "could not be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a)(3).) Montoya does not dispute that the changes to sections 188 and 189 did not alter the law regarding criminal liability for direct aiders and abettors of premeditated murder. (See *Lewis*, *supra*, 43 Cal.App.5th at p. 1135.)

Instead, Montoya contends that when evaluating her eligibility for relief, the trial court could not consider our opinion in her direct appeal. Utilizing the recent decision in *Lewis*, the Attorney General contends the court could, and did, consider our opinion in *Montoya I* as part of the record of her conviction.

We conclude that the trial court properly considered our prior opinion as part of Montoya's record of conviction to determine whether she was ineligible for relief as a matter of law. (Accord, *Verdugo*, *supra*, 44 Cal.App.5th at p. 323; *Lewis*, *supra*, 43 Cal.App.5th at pp. 1137–

1140; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 909 (*Tarkington*); *People v. Torres* (2020) 46 Cal.App.5th 1168, 1178 (*Torres*), rev. granted, S262011, June 24, 2020; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), rev. granted, S260410, Mar. 18, 2020.) We reach this conclusion for three reasons.

First, the statutory language of section 1170.95 contemplates consideration of the record of conviction at the first prima facie review stage, where the court must determine whether a petitioner "falls within the provisions of this section" based on "all the requirements of subdivision (a)." (§ 1170.95, subds. (b)(1), (c).) "If any of the information required" is missing—as was the case in Montoya's petition—the court may deny the petition unless the missing information can be "readily ascertained by the court."[12] (§ 1170.95, subd. (b)(2).) We agree with the *Verdugo* court that this language is not meaningless. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249 [ignoring statutory language violates the maxim that courts should give meaning to every word of a statute if possible].) To "readily ascertain[]" missing information, the court must be permitted to consider documents outside of the petition, including the record of conviction.

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[12] Petitions for relief must include a declaration by the petitioner that he or she is eligible for relief based on all the requirements under subdivision (a), and must include the superior court case number, year of the petitioner's conviction, and the requested appointment of counsel. (§ 1170.95, subd. (b)(1).) Montoya concedes her petition did not include a declaration and did not identify the year of her conviction.

Second, the legislative history of section 1170.95 confirms the Legislature intended to create a substantive gatekeeping function to screen out petitioners who are ineligible for relief as a matter of law. (See *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 483–484 [revisions to bill during the enactment process provides assistance in ascertaining the Legislature's intent].) As introduced, S.B. 1437 required the court to return a petition if it was missing information, and it directed the court to request various documents from the record of conviction, including charging documents, the abstract of judgment, and "'[a]ny other information the court finds relevant to its decision.'" (*Verdugo*, *supra*, 44 Cal.App.5th at p. 331, fn. 10, quoting Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as introduced Feb. 16, 2018, § 6.) S.B. 1437 was later revised to delete the court's initial review and to require the trial court, upon receipt of the petition, to automatically order briefing from the parties regarding entitlement to relief. (*Verdugo*, *supra*, at p. 331, citing Sen. Bill. No. 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, § 6.) The final version of the bill revived the initial gatekeeping function by authorizing the dismissal of incomplete petitions, and requiring the court to determine if a petitioner made a prima facie showing that he or she falls within the provisions of the statute before ordering briefing. (*Verdugo*, *supra*, at p. 331, citing Sen. Bill No. 1437 (2017-2018 Reg. Sess.) as amended Aug. 20, 2018, § 4.)

Third, we find guidance in analogous petitioning procedures for resentencing under sections 1170.18 and 1170.126, and for vacating a conviction under habeas corpus law. Those procedures contemplate a gatekeeping function in which trial courts review the record of a

petitioner's conviction to determine if the allegations set forth by the petitioner are untrue as a matter of law. (See *People v. Washington* (2018) 23 Cal.App.5th 948, 955 [§ 1170.18]; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 7 (*Oehmigen*) [§ 1170.126]; *People v. Drayton* (2020) 47 Cal.App.5th 965, 979 (*Drayton*) [habeas corpus].)[13]

In light of our conclusion that a trial court may consider the record of conviction when determining whether the petitioner is ineligible for relief as a matter of law, we further conclude that a court may review a prior appellate opinion as part of the record of conviction. (See *People v. Woodell* (1998) 17 Cal.4th 448, 456 (*Woodell*); *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1141.)

When considering a prior appellate opinion or any part of the record of conviction during its first prima facie review stage, the trial court must limit its review to determining whether the petitioner is ineligible for relief as a matter of law. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328; *Drayton*, *supra*, 47 Cal.App.5th at p. 980; see *Oehmigen*,

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[13] We recognize there are various differences between habeas proceedings and proceedings under section 1170.95. The court's conclusion in *Drayton*—that a trial court may review the record of conviction during a habeas proceeding—was premised on the court's ability to request the record of conviction through an informal response from the prosecution or custodian of record. (See *Drayton*, *supra*, 47 Cal.App.5th at p. 979.) Though no such informal response is authorized under section 1170.95, we find the inconsistency to be an unimportant one. Both proceedings require that the trial court "screen" for meritless petitions before requiring formal pleadings and holding an evidentiary hearing. (See *People v. Romero* (1994) 8 Cal.4th 728, 742 ["'Some kind of screening capability is essential to the sensible fulfillment of habeas corpus responsibility'"].)

supra, 232 Cal.App.4th at p. 7 [a trial court's decision "is a question of *law*: whether the facts in the record of conviction are the proper subject of consideration, and whether they establish eligibility"].) In other words, the court must ascertain "the nature of the crime of which the [petitioner] had been convicted" (*Woodell*, *supra*, 17 Cal.4th at p. 459), and must not resolve a contested issue of fact, such as the circumstances of the crime. (See *Maas v. Superior Court* (2016) 1 Cal.5th 962, 977 [ruling on a petition for writ of habeas corpus does not involve resolution of a contested issue of fact, but a contested issue of law]; *Woodell*, *supra*, at p. 459 [recourse to record of conviction precludes relitigation of the circumstances of the crime].)

In this case, the trial court properly considered our opinion to ascertain the nature of Montoya's conviction. In Montoya's direct appeal, we held that the trial court's error in instructing the jury on the natural and probable consequences doctrine was harmless beyond a reasonable doubt because "the jury based its first degree murder verdict on the legally valid theory that Montoya directly aided and abetted an intentional, deliberate, and premeditated murder." (*Montoya I*, *supra*, at p. 22.) Our holding directly refutes the petition's conclusory allegation that Montoya was not a direct aider and abettor of premeditated murder. (§ 1170.95, subd. (a)(3); *Verdugo*, *supra*, 44 Cal.App.5th at p. 328; cf. *People v. Duvall* (1995) 9 Cal.4th 464, 474 [conclusory allegations in habeas petition made without explanation do not warrant relief or an evidentiary hearing].) Thus, the court properly determined Montoya was ineligible for relief as a matter of law.

Anticipating this conclusion, Montoya contends our holding in *Montoya I* should not preclude her from relitigating her liability for first degree murder. We disagree. Fundamental rules of appellate review are specifically designed to preclude the possibility of this type of multiple litigation of the same issue. (*People v. Gray* (2005) 37 Cal.4th 168, 196 (*Gray*).) Among these is the law of the case doctrine, which precludes this court from inquiring into the merits of *Montoya I* so long as our prior legal determination was predicated on a point of law that was actually presented and determined by the court. (*Id.* at p. 197; *People v. Shuey* (1975) 13 Cal.3d 835, 841, overruled on another point as recognized by *People v. Bennett* (1998) 17 Cal.4th 373, 389, fn. 5.)

Application of the law of the case doctrine is subject to numerous qualifications, none of which apply here. We affirmed Montoya's direct appeal; we did not reverse or remand the matter for a subsequent trial. (*People v. Barragan* (2004) 32 Cal.4th 236, 246–247, citing *People v. Mattson* (1990) 50 Cal.3d 826, 850). Though S.B. 1437 constitutes intervening authority, it does not affect the outcome of Montoya's direct appeal. (See *Gray*, *supra*, at p. 197.) Finally, Montoya's disagreement with the outcome of her prior appeal under *Chiu* does not mean application of the doctrine will result in an unjust decision, particularly when Montoya argued why she believed the error was not harmless. (*Ibid.*; *People v. Cooper* (2007) 149 Cal.App.4th 500, 525.)

This court's legal determination in *Montoya I*—that the instructional error under *Chiu* was harmless beyond a reasonable doubt because the jury must have found Montoya guilty of direct aiding and

abetting premeditated murder—is law of the case on the nature of Montoya's prior conviction. That determination compelled a finding that Montoya was ineligible for relief under section 1170.95 as a matter of law. The trial court did not err in making that conclusion.

2. *Montoya Was Not Entitled to Appointed Counsel at the Initial Prima Facie Review*

Montoya contends she had a statutory right to the appointment of counsel because her petition checked the box requesting appointed counsel for "re-sentencing process."

Our colleagues in Divisions One, Three, Five, Six, and Seven have held that the trial court's "duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner 'falls within the provisions' of the statute." (*Lewis*, *supra*, 43 Cal.App.5th at p. 1140; accord, *Tarkington*, *supra*, 49 Cal.App.5th at p. 901; *Torres*, *supra*, 46 Cal.App.5th at p. 1178; *Cornelius*, *supra*, 44 Cal.App.5th at p. 58; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 332–333.)

Pending further guidance from our Supreme Court on when the right to appointed counsel arises (*Lewis*, *supra*, S260598), we agree with our colleagues and conclude that Montoya was not entitled to appointed counsel because she was found ineligible for relief as a matter of law.

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DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.